No. 10,229

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN SURETY COMPANY
(a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STERLING M. WOOD,
ROBERT E. COOKE,
Securities Building, Billings, Montana,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

93 Fed 2nd 238

Cases

Codes

Texts

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STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS.

This action was tried on the complaint of United States of America (Tr. 2 to 26), the Appellee in this Court. It is alleged in the said complaint (Tr. 2) and admitted in the answer of Appellant (Tr. 30) that United States of America brought this action in its own behalf, and in the United States District Court for the District of Montana, by reason of the provisions of Section 41, Title 28, United States Codes. Those allegations and admissions and the fact that Appellee is the United States of America gave the lower Court jurisdiction in the premises under the statute mentioned.

The jurisdiction of this Court is based on United States Codes Title 28, Section 225, which provides

that the Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions of the District Courts.

STATEMENT OF THE CASE.

This action is one in which United States of America seeks to recover damages for the alleged breach of a construction contract made with one John V. Grogan, as the contractor, for the erection of certain buildings at the United States Inspection Station at Babb-Piegan in Glacier County, State of Montana. While John V. Grogan was made a party to the action in the Court below, he was not served with process and did not appear. The American Surety Company, a corporation whose true name is American Surety Company of New York (Tr. 30), wrote the bond to secure the performance of the said construction contract. It was named as a defendant in this action, was served with process, alone defended the action, and now takes the appeal herein to this Court from the judgment rendered against it in the lower Court.

The action was tried to the Court, without a jury, which made its findings of fact and conclusions of law (Tr. 76 to 81) in favor of Appellee and upon which judgment was entered April 27, 1942 (Tr. 82 to 84), against Appellant in the amount of $14,400.19, being $11,919.04 damages and $2481.15 interest on that sum, together with costs of $33.20. Appeal was duly taken therefrom to this Court (Tr. 84 and 85) upon July 21, 1942.

Appellant contended in the Court below, and does here, that there was a complete failure of proof by Appellee and that there is no evidence in the record to support the judgment from which this appeal has been taken. The further contention of the Appellant has always been, and is now, that, in any event, under the pleadings and the evidence, the Appellee is not entitled to recover $9875.00 of the total damages awarded, or interest thereon, being the damages claimed for delay in completion at the rate of $25.00 per day. The Appellant, at the proper time, moved to dismiss the action in the lower Court as against itself, the only defendant before the Court and the only defendant served, upon the ground that upon the facts and the law Appellee had shown no right to relief (Tr. 74 and 75). Furthermore, in connection with the contention that in no event has the Appellee the right to recover liquidated damages of $25.00 per day, Appellant moved prior to trial to strike from the complaint (Tr. 27) all of paragraph XI thereof, relating to such liquidated damages, upon the ground that the matter pleaded therein was redundant and immaterial. All these motions were denied. Objection was also made in the lower Court to the introduction of certain evidence, and the entire record is before the Court upon this appeal, showing the evidence admitted over objection with the specific objections made thereto.

The action was tried upon the complaint, and the answer of Appellant, which latter pleading put the Appellee to its proof in the main as to the allegations of the complaint. The only evidence in the record

was introduced by Appellee. The Appellant introduced no evidence but rested its case (Tr. 75) when the lower Court denied its motion to dismiss at the close of Appellee's case in chief.

SPECIFICATION OF ERRORS.

Specification of Error No. 1.

The trial Court erred in denying Appellant's motion (Tr. 27 to 29) to strike that portion of Appellee's complaint (Par. XI, Tr. 8) relating to liquidated damages of $25.00 per day for delay in completion of the contract involved.

Specification of Error No. 2.

The trial Court erred in admitting in evidence (Tr. 43 to 48) over Appellant's objection to the same as incompetent and irrelevant, Plaintiff's Exhibit 10, being advertisement for bids.

Specification of Error No. 3.

The trial Court erred in admitting in evidence (Tr. 48 to 66) over Appellant's objections to the same as incompetent and irrelevant, Plaintiff's Exhibit 11, being a construction contract entered into by the Government.

Specification of Error No. 4.

The trial Court erred in admitting in evidence (Tr. 66 to 72) over Appellant's objections to the same as incompetent, Plaintiff's Exhibit 12, being a public voucher and two checks.

Specification of Error No. 5.

The trial Court erred in denying Appellant's motion, made at the close of Appellee's case (Tr. 74 and 75), to dismiss the action as against the said Appellant upon the ground that upon the facts and the law the Appellee had shown no right to relief.

Specification of Error No. 6.

The trial Court erred in making and filing its findings of fact and conclusions of law (Tr. 76 to 81) in favor of the Appellee and against the Appellant, in that there is no evidence nor any sufficient evidence in the record to support the said findings or the said conclusions, or any of said findings or conclusions, and that the said conclusions are contrary to law.

Specification of Error No. 7.

The trial Court erred in rendering judgment (Tr. 82 to 84) in favor of the Appellee and against the Appellant in that there is no evidence nor any sufficient evidence to support the said judgment.

ARGUMENT OF THE CASE.

I.

THE AWARD OF DAMAGES BY THE TRIAL COURT AT THE RATE OF $25.00 PER DAY FOR DELAY IN COMPLETION OF THE CONTRACT BY THE CONTRACTOR, GROGAN, IS CONTRARY TO THE PLAIN AND UNAMBIGUOUS TERMS OF THE CONTRACT WHICH FIXES AND LIMITS THE DAMAGES THAT MAY BE RECOVERED BY THE GOVERNMENT UPON A BREACH THEREOF.

It is alleged specifically in the complaint, and admitted in the answer, as follows, to-wit:

(a) That the time for the completion of the work by Grogan under the construction contract here involved was duly extended to June 20th, 1933;

(b) That on June 20th, 1933, Grogan had not completed the required work under the contract and had not done so on July 20th, 1934;

(c) That on the 20th day of July, 1934, the Appellee notified Grogan in writing that his right to proceed under the contract was terminated on such last mentioned date.

Then the Government took over the work and alleges that it completed the same.

The parties to the construction contract here have plainly stipulated and agreed what the damages shall be that the Appellee may recover upon Grogan's failure to complete his work as required therein. That contract is Exhibit A (Tr. 9 to 24), annexed to the complaint, and Article 9 of the contract (Tr. 15 to 17) contains the stipulation and agreement of the

parties with respect to damages payable to the Government upon Grogan's default. To paraphrase that Article it provides that the damages payable by Grogan upon default shall be "excess cost" to the Government *if it terminates the contract* and takes over the work and completes it, but that he shall pay liquidated damages of $25.00 per day until the work is completed or accepted *if the Government does not terminate the contract* for default. In other words, the Government is given alternative rights in the premises. The election by the Government to exercise one right prohibits it from exercising the other, for such is the plain effect of the contract language. To be specific, Article 9 of the contract reads as follows:

> "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article I, or any extension thereof, or fails to complete said work within such time,
>
> (Alternative Number 1) *The Government may, by written notice to the contractor, terminate his right to proceed* with the work or such part of the work as to which there has been delay. *In such event, the Government may take over the work and prosecute the same to completion* by contract or otherwise, *and the contractor and his sureties shall be liable* to the Government *for any excess cost* occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances,

and plant as may be on the site of the work and necessary therefor.

(Alternative Number 2) *If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work,* in which event the actual damages for the delay will be impossible to determine *and* in lieu thereof *the contractor shall pay to the Government* as fixed, agreed, and *liquidated damages for each calendar day of delay until the work is completed or accepted* the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof (the amount being $25.00 per day)."

The matter placed in parentheses is our own and for the purpose of emphasizing the point of the argument here presented to the Court, and the italics have been added by us for the same reason.

As pointed out, supra, it has been admitted by all concerned that the Government, by written notice to the contractor, Grogan, terminated his right to proceed with the work. This was done in July, 1934, or some thirteen months after the date in June, 1933, when the contract as extended, should have been completed by Grogan. Yet in the face of these admitted facts the Government has claimed damages under each of the above-mentioned alternatives, namely, alleged excess cost of completion and also $25.00 per day as liquidated damages; and the lower Court, by its findings and judgment, has awarded damages of $2044.04, as excess cost, and of $9875.00 as liquidated

damages at the rate of $25.00 per day for 395 days, together with interest. This item of $9875.00 is arrived at by taking the time that elapsed between the 20th day of June, 1933, the date for the completion of the work by Grogan, and July 20th, 1934, when the contractor's right to proceed with the work was terminated by the Government, or a total of 395 days, and by multiplying that number of days by $25.00, the amount agreed upon as liquidated damages per diem.

Under the plain language quoted, supra, of Article 9 of the construction contract there is no right in the Government to liquidated damages of $25.00 per day for delay unless the Government *does not terminate* the right of the contractor to proceed. If, under the contract, the Government does terminate the right of the contractor to proceed, then, plainly, under the unambiguous language of the contract, the liquidated damage clause, fixing $25.00 per day for each day of delay, does not become operative at all. Therefore, since the Government has terminated the right of the contractor here to proceed, the situation is precisely the same as though there had been no provision for liquidated damages of $25.00 per day in the written construction contract. The language of the contract is plain, unambiguous and decisive in this connection and is sufficient, without more, to establish that the findings and judgment of the lower Court, insofar as they award the Government $25.00 per day liquidated damages for 395 calendar days, or a total of $9875.00, and interest on that sum, are wholly without support in the record.

The law is well settled that parties to a contract may stipulate what damages shall be paid upon a breach of that contract and that a stipulation of the kind is enforcible. Thus, in *Wise v. United States,* 249 U. S. 361, 63 L. Ed. 647 and 649, the Court says:

> "Courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum, or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, * * *. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, nor why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced."

See also in this connection *Stone, Sand & Gravel Co., et al., v. U. S.,* 234 U. S. 270, 58 L. Ed. 1308 and 1312.

Furthermore, it is a settled principle of law that where the terms of a writing, as here, are plain and unambiguous, there is no room for construction of that writing by the Courts since the only office of judicial construction is to remove doubt and uncertainty.

> 12 *Am. Jur.,* Contracts, Par. 229, page 752, and cases under Note 11.

In *Kihlberg v. United States,* 7 Otto 398, 24 L. Ed. 1106 and 1108, the Supreme Court of the United States said in this connection:

> "The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

And in *Green, et al. v. Biddle,* 8 Wheaton 1, 5 L. Ed. 547 and 569, the same Court said:

> "Where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained."

Yet here the trial Court has placed a construction upon Article 9 of the construction contract that is in hostility with its plain and obvious meaning. The lower Court's exposition of that contract is contrary to the express words of the instrument. The Government is bound by the contract and has thereby limited its rights now to a recovery, as damages, of excess cost only since it has terminated the contract for non-performance by the contractor and has completed the work involved. It may not be urged now under the contract and the applicable law that the Government ought to be given damages for delay at the rate of $25.00 per day, for the Government has expressly stipulated to the contrary in its own con-

tract with the contractor. Damages for delay could be recoverable now by the Government under this contract only if comprehended by the term "excess cost" in the contract; and if that term is broad enough to include damages for delay in completion, those damages of necessity would have to be pleaded specially, or certainly proven by evidence, to be so recoverable. That has not been done in the case at bar.

But apart from the foregoing general argument the decided cases by the Appellate Courts of the country, involving contract provisions identical with those in the case at bar, are unanimous in holding that the rights of the Government to recover damages under this form of construction contract are alternative rights and that the contract is binding in this respect upon the Government and limits its recovery. These Courts hold that, where the Government elects to exercise one alternative and terminates such a contract for non-performance, as it has done here, and takes over and completes the work involved, it can collect *only excess cost* from the defaulting contractor or his surety, and that the Government is then without right to exercise the other alternative and to recover liquidated damages at the contract rate specified.

The latest decision we have found that specifically announces the rule just stated is that of *United States of America v. John K. Cunningham, Receiver,* decided December 15th, 1941, and reported in 125 F. (2d) 28, this being a decision by the United States Court of Appeals for the District of Columbia.

The facts involved in the *Cunningham* case are in all essentials the same as those in the case at bar. There the United States entered into a written contract for the construction of a bridge in the City of Washington, and it is evident that Article 9 of that contract is identical with Article 9 of the contract with Grogan in the case at bar. All the decided cases show that Article 9 with which the Court must deal here is a standard form of damage clause that the Government is using in its construction contracts. The contract in the *Cunningham* case provided that the work should be completed upon July 17th, 1932, failing which the United States were authorized to take over the work and prosecute it to completion, holding the contractor for any excess cost, or the Government had the right thereunder to permit the contractor to continue the work to completion and to then collect an agreed amount of "liquidated damages". On September 12th, 1932, *nearly two months after the expiration date,* the work not then being completed, the United States terminated the contract and in the final settlement with the contractor deducted from the contract price the excess cost of the work, and also liquidated damages for delay, of $2030.00. Suit was thereafter brought by Cunningham, the receiver for the contractor, and under the Tucker Act, to recover the liquidated damages of $2030.00 so withheld, and other items not necessary to be considered in the argument herein. The lower Court permitted the receiver to recover the said amount of liquidated damages, and to that extent the judgment was affirmed upon appeal by the United

States Court of Appeals for the District of Columbia. In deciding the case the Court of Appeals said:

> "The deduction was made under Article 9 by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States were given two rights—*One,* to take over the work and complete it and to hold the contractor for any excess costs; *the other* to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed. *We think these rights are alternative.* The article states that if the government does not terminate the right of the contractor to proceed, then the contractor shall continue the work and liquidated damages may be assessed. But in this case United States did terminate the contract and did take over and complete the work and did collect the excess cost. Having chosen this method of completing the contract, they cannot also claim the other alternative of liquidated damages. Similar provisions in government contracts have been consistently so construed by the court of claims. See particularly, Fidelity and Casualty Company of N. Y. v. United States, 81 Ct. Cl. 495; Commercial Casualty Ins. Co. v. United States, 83 Ct. Cl. 367. In the first named case the Court of Claims said:
>
> 'The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the contractor.' "

Other cases cited and considered in the *Cunningham* case and which likewise support the contention of the Appellant in the case at bar, are as follows, to-wit:

United States v. Maryland Casualty Company, 25 F. Supp. 778;

American Employer's Ins. Co. v. U. S., 91 Ct. Cl. 231.

It follows, therefore, upon reason, and precedent and because of contract restrictions, that the action of the trial Court in awarding liquidated damages of $25.00 per day to the Government herein is plainly erroneous.

The foregoing argument is directed at Specification of Errors Numbered 1, 5, 6 and 7. In conclusion upon this phase of the argument we quote the following excerpt from the *Cunningham* case, supra, to-wit:

> "To hold as the Government asks us in this case (the request being to allow the Government to recover not only excess cost but also liquidated damages) would be not only to disregard the plain, unambiguous language of the Government's own contract, but to make a new and different contract for the parties, and this we have already said we may not do."

II.

THE APPELLEE HAS WHOLLY FAILED TO PROVE ALLEGATIONS OF ITS COMPLAINT ESSENTIAL TO THE CAUSE OF ACTION DECLARED UPON THEREIN, AND THERE IS NO EVIDENCE NOR ANY SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE LOWER COURT OR THE JUDGMENT ENTERED THEREON AS TO THE DAMAGE ITEM OF $2044.04.

Under this heading of the argument the Appellant contends, substantially, that, apart from the damage item of $9875.00, awarded by the lower Court as damages for the delay of 395 calendar days in completing the contract, there is a complete failure of proof on the part of the Appellee with respect to the other item of damages awarded by the lower Court, of $2044.04.

The finding of the lower Court as to this last mentioned item (Tr. 79 and 80) is that because of the failure of Grogan to perform his contract the Plaintiff was required to and did necessarily lay out and expend the sum of $2044.04 more in causing the work to be done and in completing the said contract than it would have been required to lay out and expend had Grogan duly performed his contract and completed the work as he had promised and agreed to do. This finding, by plain inference and as a necessary consequence of the language of the trial Court, declares that it cost the Government the sum mentioned to complete the Grogan contract in accordance with the plans, specifications, etc. of that contract.

Furthermore, as established by previous argument herein, the Government must justify its claim for

damages in the case at bar under Article 9 of the Grogan contract, and bring that claim, by proof, within the provisions of that article of the contract. That article provides, in substance, that, when the Government takes over the work after default and after termination of the right of the contractor to proceed, the Government shall prosecute *that work* to completion, namely, the work provided for by the Grogan contract and the plans and specifications for the same, and that the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. This contract provision means just what it says, namely, that *the work* shall be completed—the work comprehended by the Grogan contract—which, of necessity, must be pursuant to the plans, specifications, drawings, etc. of the Grogan contract, and not otherwise.

All of the foregoing leads to the conclusion that, under the plain terms of the contract, the Government had the burden herein of establishing that the work it had done, by separate contract, after the termination of the Grogan contract, was merely a continuation to completion of the work provided for by the Grogan contract. It had the burden of proving that the excess cost incurred by it in that connection was the cost of making the unperformed work conform to the Grogan contract. Apart from the contract terms in this connection, which are wholly plain, the law is well settled generally that, in cases of defective performance of building contracts, the general measure of damages

is the reasonable cost of making the work conform to the original contract.

9 *Am. Jur.,* Building and Construction Contracts, Par. 152;

Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S. 520, 32 L. Ed. 1035;

15 *Am. Jur.,* Damages, Par. 46;

9 *C. J.,* Building and Construction Contracts, Par. 153;

27 *Amer. & Eng. Ann. Cases* (Ann. Cas. 1913B), page 781 (Note);

38 *A. L. R.* 1383;

Sutherland on Damages, 4th Edition, Vol. 3, Par. 699.

To restate the principle upon which the Appellant stands in this connection, the burden was upon the Government at the time of trial to establish by way of foundation for its alleged "excess cost" items that the contract it made for completion (a) covered only the unperformed work under the Grogan contract, and (b) provided that it should be done and completed in accordance with the plans, specifications, drawings, etc. of the Grogan contract. Otherwise evidence of cost would be incompetent. Furthermore, payments made by the Government to Government construction engineers neither would nor could be competent without proof that the work such men did was reasonably necessary to complete the Grogan contract in accordance with the plans, specifications, drawings, etc. of that contract. Yet we contend that there is no such foundation evidence in this record and

that the record is barren of any showing by the Government, or otherwise, that the payments made by it under its so-called completion contract or to Government engineers and others for supervision, inspection, etc., were reasonably or otherwise necessary to complete the Grogan contract and the work thereunder. The record herein establishes no more than the following facts for the Government with respect to alleged "excess cost", to-wit:

(1) That a contract was made by the Government with McGinnis & Lancaster (Tr. 49 to 66), which contract recites that it is "for completion of the construction of the Inspection Station at Babb-Piegan, Montana," (Tr. 50) for a consideration of $4280.00, and "in strict accordance with the specifications, schedules, and drawings, * * * and designated as follows: Specification for completion of construction of the United States Inspection Station at Babb-Piegan, Montana, dated May 22, 1934;" (Tr. 50)

(2) That under that contract an amount of $3781.00 was paid to McGinnis and Lancaster; (Tr. 73)

(3) That J. B. Lavine, a construction engineer, was paid $2137.54; (Tr. 73)

(4) That $414.00 was paid to various Government engineers in salaries, expenses, etc. (Tr. 74)

It is a far cry indeed from proof of the foregoing facts to the proof required, under the law, to establish liability upon the part of the Appellant for any cost items whatever.

There is no proof whatever in the record that the McGinnis and Lancaster contract was to complete the inspection station at Babb-Piegan, Montana, *in accordance with the specifications, plans and drawings of the Grogan contract.* On the contrary it appears that a different set of specifications, at least different in date, was used as a basis for the McGinnis and Lancaster contract. If by any chance the specifications of the two contracts were the same, there is no proof whatever to that effect. Neither is there any proof whatever in the record that the monies paid to Lavine, construction engineer, and to the other engineers, were paid in connection with the completion of the Babb-Piegan station *in accordance with the specifications, drawings, etc. of the Grogan contract* or that the payments to Lavine and the other engineers were made because reasonably necessary in connection with the completion of that station.

The theory of the complaint here, as of course would have to be the case under the applicable law, is that the Government completed the work that Grogan obligated himself to do and did so pursuant to the requirements of the Grogan contract, thereby incurring excess cost which is computed as follows, to-wit:

Payments under contract for completion (the one let to McGinnis and Lancaster)	$ 3,781.00
Payments to J. V. Lavine, construction engineer for the Government	2,137.54
Payments to various engineers for salary and expenses	414.00
Total of payments to Grogan	49,602.50
TOTAL	$55,935.04
Deducting therefrom (Par. VI of the complaint) the amount Grogan was to receive	53,891.00
Leaves a balance of	$ 2,044.04

as excess cost.

Under the record herein the theory of the complaint is still but theory only. None of the alleged cost items is recoverable by the Government for the reason that there is no evidence in the record establishing or even tending to establish that they, or any of them, were incurred or expended to complete the inspection station at Babb-Piegan, Montana, *in accordance with the Grogan contract and its plans, specifications, drawings, etc.*

From the foregoing it is evident that specification of errors numbered 2, 3 and 4 are well taken. The Appellant properly objected to the introduction in evidence of the McGinnis and Lancaster contract, and to the advertisement for bids, as incompetent because no foundation for the introduction of such evidence had been laid. All of that evidence was incompetent because the Government did not show

that the McGinnis and Lancaster contract was but a continuation of the Grogan contract (if such is in fact the case) and that the specifications for the two contracts are the same as to the work left undone by Grogan. For the same reason evidence of payments under the McGinnis and Lancaster contract was incompetent and was properly so objected to by the Appellant.

As to the payment to engineers for salaries and expenses, it was conceded only, at the time of trial, by the Appellant that payment of the sums of $2137.54 and $414.00 was made (Tr. 73 and 74). In making that admission the Appellant admitted only the fact of payment and there is nothing whatever in the record to show that these sums were reasonably necessary to be paid to complete the Grogan contract.

The foregoing necessarily leads to the further conclusion that specification of errors numbered 5, 6 and 7 were properly assigned in that, upon the facts and the law, the Appellee has shown no right to relief as to the item of $2044.04. The findings of fact and conclusions of law of the trial Court as to that item are unsupported by any sufficient evidence and the judgment, too, is without support in the record.

CONCLUSION.

Under this record there is no basis in law for the award to the Government of liquidated damages of $25.00 per day and no basis in fact for allowing the Government to recover alleged "excess cost". The

motion of Appellant at the close of Appellee's case in chief (Tr. 74 and 75) to dismiss the action, upon the ground that upon the facts and the law the Appellee had shown no right to relief was, accordingly, proper under the provisions of Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States, and that motion should have been granted. The lower Court erred in denying that motion as it did in making its findings and conclusions for Appellee and in rendering judgment accordingly. There is no support in the record for the findings, conclusions and judgment since the Government plainly has shown no legal right to liquidated damages for delay and has wholly failed to establish by any competent evidence that it completed the Grogan contract and incurred "excess cost".

The record further shows that the Court has allowed interest from November 1st, 1937, on the liquidated damages award of $9875.00 and on the other item of allowed damages of $2044.04. This interest item at the time the judgment was entered (Tr. 83 and 84) amounted to $2481.15. The basis for the allowance of interest from November 1st, 1937, is found in the allegation of the **complaint** (Tr. 8) that the Government then made its demand upon Grogan and the Appellant to pay. Yet in spite of the fact that the demand was made upon November 1st, 1937, as admitted in the answer (Tr. 32), this action to recover the damages demanded was not filed until nearly three years later, to-wit: upon August 5th, 1940 (Tr. 26). Therefore, on the principle of *U. S. v. Sanborn,* 135 U. S. 271, 34 L. Ed. 112, the Government should not be allowed in

any event to recover interest on damages herein. Not only did the Government long delay an assertion of its claimed rights, without showing any reason or excuse for the delay, but it nowhere appears of record that the Appellant has in anywise profited by not having heretofore met the Government's demand.

For all of the reasons urged in this brief the judgment appealed from herein should be reversed with directions to the lower Court to enter its judgment dismissing the action as against the Appellant.

Dated, Billings, Montana,
October 30, 1942.

STERLING M. WOOD,
ROBERT E. COOKE,
Attorneys for Appellant.